

1 HONORABLE JAMES L. ROBART
2
3
4
5
6
7
8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

9 ERIC DODGE, an individual,

10 Plaintiff,

11 vs.

12 EVERGREEN SCHOOL DISTRICT NO. 114,
13 a public corporation; CAROLINE GARRETT,
14 an individual; and JANAE GOMES, an
individual,

15 Defendants.

Case No. 3:20-cv-05224-JLR

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

Noted for Consideration:
December 4, 2020

Without Oral Argument

16 **I. INTRODUCTION**

17 Motions for summary judgment have been filed by Evergreen School District No. 114
18 and Janae Gomes on the one hand [Dkt. #36] and Caroline Garrett on the other [Dkt. #39], but
19 the motions are based on identical grounds and so will be responded to together.

20 Regarding plaintiff's First Amendment retaliation claim under §1983, defendants seek
21 summary judgment on a narrow and specific ground: that plaintiff, by his own admission, did not
22 subjectively intend his "Make America Great Again" (MAGA) hat to be "expressive conduct".
23 This argument is misguided for two reasons: (1) defendants apply the wrong legal standard
24 because the MAGA hat was "pure speech"; and (2) defendants mischaracterize plaintiff's
25 testimony on his rationale for wearing the hat. As a result, defendants' specific legal challenge

1 to the First Amendment retaliation claim fails, and defendants have not raised any challenges to
 2 any other element of that claim.

3 Regarding defendants' challenges to plaintiff's alternative substantive due process claim
 4 under §1983 and his pendent state-law claim for the tort of outrage, these challenges should be
 5 rejected because genuine issues of material fact exist to prevent judgment as a matter of law.
 6 Alternatively, these challenges should be denied or deferred under Rule 56(d) of the Federal
 7 Rules of Civil Procedure given that discovery is still in the early stages.

8 II. FACTUAL BACKGROUND

9 A. Plaintiff's Complaint

10 Plaintiff Eric Dodge's allegations are set forth in detail in his First Amended Complaint
 11 [Dkt. #25]; *see also* Order on Defendants' Motion to Dismiss under Rule 12(B)(6) at Dkt. #24, p.
 12 7 (finding plaintiff's First Amendment retaliation claim under 1983 to be adequately pled).
 13 Defendants have not challenged the bulk of these allegations for the purpose of these motions.

14 B. Plaintiff's Testimony Regarding the Wearing of His MAGA Hat

15 From Tuesday, August 20 to Friday, August 23, 2019, plaintiff Eric Dodge was present at
 16 his place of employment, Wy'East Middle School in Vancouver. This was the week before
 17 classes, so students were not yet around; teachers could work this week to set up their classrooms
 18 and participate in trainings. Each day that Dodge was at Wy'East that week, he wore his MAGA
 19 hat in the school parking lot while walking from his vehicle to the front door. Declaration of
 20 Michael Estok ("Estok Decl."), Ex. 1 (Dodge Depo. at 72:18 – 73:1 & 74:10-14 & 77:11-19).

21 Dodge wore the hat for two reasons. First, he had been advised by his dermatologist to
 22 wear a hat on sunny days to avoid skin cancer on his scalp, and the MAGA hat was essentially
 23 the only hat that he owned. *Id.* at 74:15 – 75:17.

24 Second, he wore the hat because he believed in its message:

25 ///

1 Q. Any other reasons that you wore the Make America Great Again hat
 2 the morning of August 22nd?"

3 A. It was hot and sunny. And like I said, it was my birthday. It just felt
 4 like a good day to put a hat on and **just be proud of who I am and who**
we are as a country. And so I – that was why I wore it.

5 *Id.* at 75:18-23 (emphasis added); *see also id.* at 122:11-21 ("it's the same intention I have when
 6 I always wear it, which is **to show people who I am** and to cover the sunspots on my head").

7 The MAGA hat (seen to the right) is well known as being a
 8 campaign hat for President Trump.¹ In his deposition, Dodge
 9 explained that one of the reasons he wears it is to show support for
 10 President Trump. *Id.* at 82:2-4 ("The reason I had the hat with me
 11 was – you know one, one reason **because I show support for Donald**
 12 **Trump**") (emphasis added); *see also* Declaration of Eric Dodge, filed
 13 herewith ("Dodge Decl.") ¶2 (explaining he brought the hat to Wy'East to express support for
 14 President Trump, because he agrees with its message, and because it shows others that ordinary
 15 and normal people in the community support President Trump).



16 Shortly after this lawsuit was filed, a local newspaper ran an article on this lawsuit that
 17 parroted the defendants' contention that Dodge intentionally brought the hat to "training sessions
 18 prior to the beginning of school, including a first-day session on implicit bias, diversity and
 19 racial equity." *See Former Evergreen schools teacher sues after MAGA hat dispute*, at
 20 <https://www.columbian.com/news/2020/apr/28/ex-teacher-sues-after-maga-hat-dispute/> (last
 21 accessed 11/24/20). Dodge reviewed this article at the time it was published and viewed it to be
 22 wrongly implying that he had specifically brought the MAGA hat to such a training session as
 23 some kind of protest or commentary on the subject matter of the training. Dodge Decl. ¶3. In
 24 fact, Dodge had no advance knowledge about the subject matter of the training session until it

25 ¹ It is sold, for example, on the Trump campaign website: [https://shop.donaldjtrump.com/
 products/official-make-america-great-again-45th-president-hat-red](https://shop.donaldjtrump.com/products/official-make-america-great-again-45th-president-hat-red)

1 started. *Id.*; *see also* Estok Decl., Ex. 1 (Dodge Depo at 73:18-20) (“I didn’t know that there
 2 would be cultural sensitivity training at all until after – after the fact”); *see also id.* at 74:4-9
 3 (same).

4 Rather, Dodge explained on that on August 22, 2019, he walked into the building, signed
 5 into the office, and “at some point, I learned we were meeting in the library, so that’s where I
 6 went.” *Id.* at 76:18-25. Thus, the fact that he had the MAGA hat with him when he entered that
 7 particular training was purely incidental:

8 Q. Why did you carry your MAGA hat into that training that morning?

9 A. I had it in my hand for the – I guess the same reason I carried my
 10 backpack that morning. It was with me and that’s where I was going.

11 *Id.* at 81:7-11.

12 Regarding the deposition excerpts quoted in defendants’ motions, all of them involved
 13 questions by defendants’ counsel that were focused on Dodge’s specific intent in bringing the
 14 MAGA hat **into the cultural-sensitivity training**. *See* Dkt. #36 at pp. 5-9. Thinking back to the
 15 misleading newspaper article, Dodge repeatedly denied having any specific intent in bringing the
 16 hat into such a training. Dodge Decl. ¶4. As noted, he had no advance knowledge of what the
 17 training was going to be about, and he was not using the hat as some form of protest regarding
 18 the training. *Id.* Dodge tried to make this distinction in his responses to defense counsel:

19 Q. Were you or did you carry the hat into the meeting to show support for
 20 Donald Trump?

21 A. So that’s what I would – I’m a little confused at the question. **The**
 22 **reason I had the hat with me was – you know, one reason because I do**
 23 **show support for Donald Trump; however, that wasn’t the reason I**
 24 **brought it into the meeting. That was just with me so I went in.**

25 Estok Decl., Ex. 1 (Dodge Depo. at 81:24 – 82:6) (emphasis added).

26 Thus, defendants’ quoted deposition questions miss the point: putting aside the issue of
 the training, they failed to ask Dodge the more important question of why he brought the MAGA

1 hat to Wy’East generally or why he wore it in the parking lot. As discussed above, Dodge wore
 2 the hat—which is obviously “political” in nature—because he agreed with its message and even
 3 viewed it as being a part of “who I am”.

4 **C. Overview of Retaliation for Wearing of a MAGA Hat**

5 Defendants have not challenged the sufficiency of facts to support any of the allegations
 6 in the First Amended Complaint regarding the retaliation experienced by Dodge for wearing the
 7 MAGA hat (*see id.* at ¶¶ 30-58), and so a full factual record on those events is unnecessary.

8 In terms of a general overview, Dodge’s new supervisor was Wy’East’s principal,
 9 Caroline Garrett. Garrett was familiar with MAGA hats and understood them to be the campaign
 10 hat for President Trump. Estok Decl., Ex. 2 (Garrett Depo. at 102:6-8). She assumes that
 11 somebody wearing a MAGA hat is a supporter of President Trump. *Id.* at 102:17-21.

12 Garrett holds the belief that President Trump is a “fascist.” *Id.* at 89:2-8. She further
 13 believes “that somebody wearing a MAGA hat possibly has hateful feelings.” *Id.* at 103:15-17.
 14 Aside from Dodge, she could not identify any known Trump supporter who worked at her
 15 school. *Id.* at 92:25 – 93:8. She previously displayed a Bernie Sanders bumper sticker on her
 16 car in the Wy’East parking lot while serving as principal. *Id.* at 94:4-17.

17 After learning that Dodge had a MAGA hat on August 22, 2019, Garrett spoke about it
 18 on the phone with Evergreen’s human resources director, Janae Gomes. *Id.* at 122:24-125:11.
 19 Garrett then met with Dodge to discuss the hat. Though she maintained a “kind of cordial”
 20 attitude, Garrett told Dodge that “your hat is offensive”, that some people take it “as a symbol of
 21 hate and bigotry”, and that “I’m not a Donald Trump supporter.” Estok Decl., Ex. 1 (Dodge
 22 Depo. at 98:1-100:7 & 105:15-106:3 & 104:13-22). She concluded the meeting by stating “I
 23 can’t tell you not to wear the hat” but added: “what I will say is I advise you to just use your
 24 better judgment.” *Id.* From these statements, Dodge understood that he was prohibited from

1 wearing the MAGA hat at or around Wy’East. *Id.* After this meeting, Garrett called Gomes to
 2 fill her in on what happened. Estok Decl., Ex. 2 (Garrett Depo. at 126:4-15).

3 The next day, August 23, 2019, Dodge did not wear his MAGA hat at or around Wy’East
 4 given the prior conversation with Garrett. Estok Decl., Ex. 1 (Dodge Depo. at 113:21-114:4).
 5 However, at a mid-day training he attended at Evergreen High School, Dodge wore the MAGA
 6 hat while walking in its parking lot. *Id.* at 116:6-9. When word got back to Garrett that the hat
 7 had been sighted, Garrett again discussed the issue with Gomes. Estok Decl., Ex. 2 (Garrett
 8 Depo. at 145:11-16). According to Garrett, she consulted with Gomes multiple times throughout
 9 this process, got advice on how to handle this issue, never departed from that advice, and
 10 believes she did everything in accordance with Gomes’s direction. *Id.* at 153:25 – 154:17.

11 When Garrett approached Dodge later that day, she had an aggressive and confrontational
 12 tone. Estok Decl., Ex. 1 (Dodge Depo. at 136:13-142:17 & 147:1-148:11). She began by asking
 13 him: “What is the fucking deal with your hat?” *Id.* (As can be seen in the deposition transcript,
 14 plaintiff, who is Mormon, particularly struggles with profanity and curse words.) She then called
 15 Dodge a bigot, a homophobe, a hateful person, and a liar. *Id.* Dodge felt he was being attacked.
 16 *Id.* Garrett threatened him that he would need union representation the next time they discussed
 17 the hat. *Id.* She also emphasized that she never wanted him wearing the hat. *Id.*

18 This negative encounter with his new principal had a devastating effect on Dodge.
 19 Notably, as a result of his prior stroke injuries in 2017, Dodge was more susceptible to severe—
 20 and even physical—reactions from anxiety and stress compared to an ordinarily healthy person.
 21 Estok Decl., Ex. 3 (Nicacio Depo at 97:4-16). After the encounter, Dodge was observed by
 22 another teacher (Alicia Parkison), who saw him “shaking and stuttering” and having “an anxiety
 23 attack.” Estok Decl., Ex. 4 (CRS 1052). Dodge left Wy’East to visit his wife, who found him
 24 stuttering and not talking clearly. Estok Decl., Ex. 1 (Dodge Depo. at 148:22-149:19). Dodge
 25

1 recalls losing his physical coordination and having a difficult time completing sentences due to
 2 his worsened stutter. Dodge Decl. ¶5.

3 After the encounter with Dodge, Garrett spoke again with Gomes to keep her updated on
 4 what was happening. Estok Decl., Ex. 2 (Garrett Depo. at 145:11-16). Later that day, Dodge
 5 sent Garrett an email about the incident; though he was trying to smooth over their relationship,
 6 he also noted that he felt he was being “singled out due to my political views.” Estok Decl., Ex.
 7 5 (EPS-6890). Garrett did not respond to Dodge until three days later. *Id.* Gomes reviewed
 8 Garrett’s response and commented to her: “Excellent response!” *Id.* (EPS-6888).

9 Over the weekend, Dodge was told by his union representative that he would meet with
 10 HR (Gomes) to discuss the negative encounter on Monday. Estok Decl., Ex. 1 (Dodge Depo. at
 11 172:17-21). When he returned to Wy’East for work on Monday, Dodge was still so distressed
 12 about the situation he had a hard time talking or walking, feeling so sick and nervous about
 13 everything. *Id.* at 172:22 – 174:4. He was stuttering and walking unsteadily (a side effect from
 14 his stroke that worsens with stress), and he was concerned about people seeing him so shaken
 15 and unsteady that he missed a training and was seen by a school nurse instead. Estok Decl., Ex.
 16 4 (CRS 1048).

17 Dodge heard back from his union rep, who stated he had met with Gomes but that
 18 Evergreen was not going to do anything about this situation, which devastated Dodge further.
 19 Estok Decl., Ex. 1 (Dodge Depo. at 176:6-178:1). By Wednesday, Dodge could work only half a
 20 day because he felt trapped and unable to work. *Id.* He analogized it to panic attacks, stating he
 21 could not walk straight, could not focus, and could not think. *Id.* at 181:5-21. As a result, on
 22 Thursday, Dodge called in sick and went on extended medical leave. *Id.* at 178:2-20.

23 The physician who certified that Dodge was unable to return to work, Dr. Nicacio,
 24 explained that by August 2019, Dodge had already worked a full year since having his stroke and
 25 was improving on a new medication of Ritalin. Estok Decl., Ex. 3 (Nicacio Depo. at 92:22-

93:6). After the incident, Dodge described it to Dr. Nicacio, who upon hearing it was “shocked”, adding: “I just found that hard to believe, and I was like, that’s crazy”, adding that the incident “affected him [Dodge] quite a bit.” *Id.* at 93:7 – 94:19. Dodge’s symptoms after the incident included increased stuttering and an inability to speak clearly, and Dr. Nicacio attributed the cause of those symptoms to the altercation with Garrett. *Id.* at 94:25-97:10 & 99:9-24; *see also id.* at 80:20-81:24 (Dodge suffered anxiety from the incident and it prevented him from working because he has “a lower threshold to have this type of response to this verbal altercation”).

Pursuant to Evergreen’s policies, Dodge filed a harassment, intimidation, and bullying complaint (“HIB complaint”) regarding Garrett’s misconduct. Estok Decl., Ex. 1 (Dodge Depo. at 176:6-178:1). Through the HIB Complaint, Dodge’s hope was that he would receive a fair investigation and that Evergreen would take decisive and appropriate disciplinary action against Garrett. *Id.* at 272:12-25 & 274:11-14.

The HIB Complaint was received electronically by Evergreen’s Director of School Services, but when he forwarded it to Gomes, she immediately responded that she would handle it personally because “I am already aware of Eric being disgruntled.” Estok Decl., Ex. 6.

Evergreen was required under its policies to investigate Dodge’s complaint. Declaration of Janae Gomes, Dkt. #31 at ¶4. Gomes decided to have the HIB Complaint investigated by an “outside third-party investigator”, Chad Hoff, of Clear Risk Solutions, the third-party administrator for Evergreen’s liability insurer. *Id.*

Hoff interviewed Wy’East employees and then wrote up a first draft of his investigation report. Estok Decl., Ex. 4. One staff member (Lisa Fuller) reported that “people whose views differ from Ms. Garrett’s get shut down.” *Id.* (CRS 1051). Another staff member (Alicia Parkison) believed Dodge “was being targeted” and stated that Garrett had previously expressed in the school that “she is Anti-Trump”. *Id.* (CRS 1053). Another employee (Joe Boken) stated that Garrett had created “a double standard in the school for staff that are of different political

1 views that Ms. Garrett.” *Id.* (CRS 1055). As for Garrett, although she claimed to have a
 2 different recollection of the encounters than Dodge had, she admitted that (a) she told Dodge to
 3 have union representation if they were to speak about the hat again, and (b) she “told him she did
 4 not want him out there in the world representing their school with that hat.” *Id.* (CRS 1057).

5 Based on these interviews, Hoff concluded as follows:

6 The preponderance of the evidence confirmed that Mr. Dodge was singled
 7 out because he wore a ‘Make American Great Again’ hat. He was
8 subjected to negative treatment and denied his freedom of expression
 9 in the form of the hat, because of perceived stereotypes or political
 10 differences of opinion. **Mr. Dodge did not violate District policy in**
wearing the hat. It was also determined that Principal Garrett has
 11 allowed other political postings and messages in the school, has not
 attempted to stop those postings or messages, and has participated in
 using/posting political statements, messages, and symbols. Mr. Dodge
 kept to himself at the training, sat in the back of the room, and did not
 12 provoke or engage people about his beliefs or politics....

13 Mr. Dodge told me that he felt intimidated and threatened during the
 14 second contact with Ms. Garrett. He said she called him a racist, bigot,
 15 homophobic, and hateful based solely on his wearing the hat. Ms. Garrett
 acknowledged that she became impatient and she admitted that she told
 Mr. Dodge that if they needed to discuss the hat again, he would need
 16 union representation. **This was reasonably perceived by Mr. Dodge as**
a threat of discipline... Witnesses indicated that he was clearly shaken
 and upset and ultimately missed part of the training and had to be seen by
 17 the school nurse.... **This conversation with Ms. Garrett did have a**
substantial negative affect on Mr. Dodge, causing him to miss part of
 18 the training he was supposed to attend.

19 *Id.* (CRS 1059) (emphasis added).

20 After Gomes viewed this draft report, however, subsequent communications caused Hoff
 21 to revise his report to remove many of the above findings that supported Dodge’s complaint or
 22 that reflected poorly on Garrett or Evergreen. *See* Estok Decl., Ex. 7 (communications with
 23 Gomes after first draft) & Ex. 8 (final report). In the meantime, Gomes called Dodge to try to
 24 blackmail him into dropping his HIB Complaint prior to the conclusion of the investigation,
 25 threatening him that she would be forced to release his personal and sensitive information

1 (including medical records) to a local newspaper in response to a records request if he did not
 2 rescind his HIB Complaint. Estok Decl., Ex. 1 (Dodge Depo. at 289:3 to 291:14). When he was
 3 so threatened, Dodge couldn't sleep due to his distress. *Id.* Ultimately, Dodge responded to
 4 Gomes that he was refusing to drop his HIB Complaint. Dodge Decl., Ex. 1.

5 On October 1, 2019, Gomes then sent to Dodge a letter entitled "District Investigation
 6 Response" regarding the HIB Complaint. Dodge Decl., Ex. 2. Gomes did not provide Dodge
 7 with a copy of the Hoff report, but she described it as concluding that "an act of discrimination,
 8 harassment, intimidation and bullying **did not occur.**" *Id.* (emphasis added). She further
 9 indicated that the investigator found by a "preponderance of evidence" that "multiple staff
 10 members voiced their concerns and feelings of being uncomfortable" about Dodge's MAGA hat,
 11 thereby implying that Hoff had found that Dodge had engaged in some kind of misconduct, even
 12 though no complaint had been filed against Dodge and even though none of the Hoff reports
 13 contained this finding. *Id.*

14 Under Evergreen's policies, Dodge then appealed this HR determination on the HIB
 15 Complaint, and an appeal hearing before the Board was held on November 14, 2019. Dodge
 16 Decl. ¶8. Dodge presented a detailed overview of what had occurred thus far to the Board. *Id.*,
 17 Ex. 3. Four days later, Dodge received a letter from Evergreen, stating that it "does not find any
 18 violations under policy or procedure", and so the matter was deemed closed. *Id.*, Ex. 4.

19 Given this inaction from Evergreen, according to Dodge, the situation "became more and
 20 more devastating for me. The way that the district was handling it was actually making it
 21 worse." Estok Decl., Ex. 1 (Dodge Depo. at 194:5-12). Both the encounters with Garrett and
 22 the subsequent response by Evergreen have created a hostile workplace and a constructive
 23 discharge, making it impossible for plaintiff to reasonably or safely return to any form of
 24 employment with the Evergreen school district. Complaint ¶58. Dodge continues to suffer from
 25 an increase in stuttering and balance problems since this incident. Estok Decl., Ex. 1 (Dodge

1 Depo. at 323:22 – 325:5). He has a difficult time being around other people, especially teachers,
 2 and he becomes nervous and anxious—with an increase in stuttering and worry—any time he
 3 drives near Wy’East. *Id.*

4 Also of note, through discovery in this lawsuit, plaintiff has learned the curious fact that
 5 at the same time that Evergreen sent him his final closure letter (Dodge Decl., Ex. 4), it sent a
 6 different closure letter on the HIB Complaint to Garrett. Estok Decl., Ex. 9. While the version
 7 of the letter to Garrett began with identical language and also concluded there had been no
 8 violations of Evergreen’s policies or procedures by Garrett, it paradoxically went on to state that
 9 “the Board has outstanding questions about whether you conducted yourself in an appropriate or
 10 professional manner” in her encounters with Dodge and was going to investigate her further. *Id.*
 11 Apparently seeking to conceal this fact from Dodge, Evergreen then appointed a second
 12 investigator, who met with Garrett and interviewed her in a “hostile manner” regarding her prior
 13 interactions with Dodge on the MAGA hat. Estok Decl., Ex. 2 (Garrett Depo. at 22:14 – 23:1).

14 After this clandestine second investigation, Garrett was told that the Board held a “strong
 15 belief [that] you didn’t say some of the things to Eric as you have represented. They do not
 16 believe you are being fully forthcoming and are concerned about the professionalism which
 17 bring credibility into question.” Estok Decl., Ex. 10. Ultimately, Garrett was told she needed to
 18 either (a) resign her employment with Evergreen at the end of her contracted school year, or (b)
 19 accept discipline relating to the events with Dodge and a demotion to an assistant principal
 20 position at a high school for the following year. *Id.*; Estok Decl., Ex. 2 (Garrett Depo. at 47:4 –
 21 48:15). Facing these options, Garrett chose to resign immediately.

22 **D. Discovery is Ongoing and Not Yet Completed.**

23 While the above summary provides an overview of some key facts, discovery is still in
 24 the early stages in this case, and the discovery cutoff is not until 2/16/21. Estok Decl. ¶2.
 25 Notably, plaintiff is scheduled to depose another five key Evergreen witnesses in the coming

1 weeks, including Janae Gomes. *Id.* As a result, plaintiff has not yet had the opportunity to
 2 discover all relevant facts supporting his claims, and information from these upcoming
 3 depositions is not yet available to plaintiff as of the time of this response. *Id.*

4 III. AUTHORITY AND ARGUMENT

5 As noted by defendants, on a motion for summary judgment, the Court must view all
 6 facts, and draw all reasonable inferences relating to those facts, in favor of the non-moving party,
 7 here, plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

8 A. First Amendment Claim under Section 1983

9 Defendants have moved against this claim only on a single, narrow ground: that
 10 plaintiff's "expressive conduct" is not protected because he did not subjectively intend to express
 11 any message in wearing the MAGA hat. This argument fails for at least two reasons:

12 1) This is a "pure speech" case

13 The premise of defendants' motion is that the MAGA hat was a form of "conduct", not
 14 speech, and therefore governed by the legal standards for "expressive conduct" set forth in
 15 *Spence v. Washington*, 418 U.S. 405, 409 (1974) and *Texas v. Johnson*, 491 U.S. 397 (1989).

16 In so doing, defendants apply the wrong constitutional standard. A different standard
 17 applies when "pure speech"—whether spoken or written—is at issue. *Anderson v. City of*
 18 *Hermosa Beach*, 621 F.3d 1051, 1058-59 (9th Cir. 2010) (noting that "pure speech" cases are
 19 "entitled to full First Amendment protection without any need to resort to *Spence*'s 'sufficiently
 20 imbued' test").

21 Plaintiff's MAGA hat was "pure speech": it displayed actual written words—"Make
 22 America Great Again"—which were understood by all involved parties to be conveying a
 23 political message in support of President Trump. *Cf. Anderson*, 621 F.3d at 1060 (holding that
 24 tattoos and the process of tattooing are purely expressive activity, not merely expressive conduct,
 25 and are therefore not subject to *Spence*); *see also id.* at 1060 (listing other examples of "purely

1 expressive activities” recognized by the Supreme Court, including music without words, topless
 2 dancing, movies, parades with or without banners or written messages, and paintings; adding,
 3 “[w]e have afforded these expressive activities full constitutional protection without relying on
 4 the *Spence* test”).

5 The MAGA hat was not only “pure speech”, but it was also “political” in nature, making
 6 it “entitled to the fullest possible measure of constitutional protection.” *Members of City Council*
 7 *v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984); *Kaahumanu v. Hawaii*, 682 F.3d 789, 798
 8 (9th Cir. 2012); *see also Minn. Voters Alliance v. Mansky*, 585 U.S. __, 138 S. Ct. 1876, 1885
 9 (2018) (observing that a “ban on wearing any political badge, political button, or other political
 10 insignia plainly restricts a form of expression within the protection of the First Amendment”);
 11 *Rubin v. Young*, 373 F. Supp. 3d 1347, 1352 (N.D. Ga. 2019) (“Wearing a button with a political
 12 message is a form of expression within the protection of the First Amendment”); *Baldwin v.*
 13 *Redwood City*, 540 F.2d 1360, 1366 (9th Cir. 1976) (“Communication by signs and posters is
 14 virtually pure speech. The element of conduct in a sign posted on behalf of an issue or candidate
 15 during a campaign is minimal”, adding that **“the constitutional guarantee has its fullest and**
 16 **most urgent application precisely to the conduct of campaigns for political office”**) (quoting
 17 *Monitor Patriot Co. v. Roy*, 410 U.S. 265, 272 (1971)) (emphasis added); *James v. Bd. of Educ.*,
 18 461 F.2d 566 (2d Cir. 1972) (holding that a black arm band in protest of the Vietnam War was
 19 pure speech).

20 Here, defendants’ motions **assume** that the MAGA had was merely “expressive
 21 conduct”, but defendants provide no argument in support of that position. *See, e.g.*,
 22 *Stavrianoudakis v. U.S. Dep’t of Fish & Wildlife*, 435 F. Supp. 3d 1063, 1094 (E.D. Cal. 2020)
 23 (“The distinction between whether the activity is purely expressive activity, *i.e.*, pure speech, or
 24 conduct that merely contains an expressive component is the former ‘is more akin to writing (an
 25 example of purely expressive activity)’ and the latter is more akin to ‘burning a draft card (an

example of conduct that can be used to express an idea but does not necessarily do so.””)
(quoting *Anderson*, 621 F.3d at 1059).

Not surprisingly, defendants’ proffered “expressive conduct” cases all involved very different facts. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *United States v. O’Brien*, 391 U.S. 367 (1968) (burning draft cards); *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999) (a court administrator’s conduct in allowing two court clerks to attend a training seminar in a refusal to follow orders from her supervisor, a sitting judge); *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (pornography). None of them involved written speech akin to plaintiff’s MAGA hat.

Given that the MAGA hat falls under the protections for “pure speech”, defendants’ two-pronged legal test is inapplicable to this case. Plaintiff’s speech in wearing the hat was entitled to full First Amendment protections unless he caused substantial disruption of or material interference with school activities (which no defendant has here argued):

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, **it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.** Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.

Tinker v. Des Moines Indep. Cmtys. Sch. Dist., 383 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (emphasis added).²

Indeed, “**In our system, state-operated schools may not be enclaves of totalitarianism.**” *Id.* at 511 (emphasis added). Through the targeted retaliation by defendants here toward plaintiff simply due his MAGA hat, that is exactly what occurred. Plaintiff’s First

² Although no defendant has argued substantial disruption or material interference under *Tinker*, if they should try to add this argument now, it would similarly be a genuine issue of material fact for the jury at trial.

1 Amendment claim under Section 1983 is supported by a genuine issue of material fact and
 2 should be resolved by a jury.

3 **2) *Alternatively, the MAGA hat was expressive conduct***

4 Even assuming for the sake of argument that plaintiff's MAGA hat was not "pure
 5 speech", it would still be "expressive conduct" subject to constitutional protections and gives rise
 6 to a valid Section 1983 claim here. As an initial matter, defendants mischaracterize the *Spence*
 7 test, which was later modified to indicate that a "particularized message" is not a requisite for
 8 First Amendment protection:

9 a narrow, succinctly articulable message is not a condition of
 10 constitutional protection, which if confined to expressions conveying a
 11 "particularized message," *cf. Spence v. Washington*, 418 U.S. 405, 411, 41
 12 L. Ed. 2d 842, 94 S. Ct. 2727 (1974) (per curiam), would never reach the
 13 unquestionably shielded painting of Jackson Pollock, music of Arnold
 14 Schoenberg, or Jabberwocky verse of Lewis Carroll.

15 *Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995); *see also id.* (collecting cases with
 16 examples of expressive conduct protected by the First Amendment where a "particularized
 17 message" was not shown); *see also Kaahumanu*, 682 F.3d at 798 ("A 'narrow, succinctly
 18 articulable message' is not required").

19 Of course, this distinction is somewhat academic here because a MAGA hat—which was
 20 understood by everyone, including Garrett, to be a Trump campaign hat—is obviously a
 21 "particularized message".

22 As for plaintiff's "intent to convey a particularized message", defendants' arguments rely
 23 upon confusing deposition excerpts where counsel's questions were specifically focused on
 24 Dodge's intentions in bringing the MAGA hat into a cultural-sensitivity training meeting, as
 25 opposed to wearing the hat generally. As discussed in Part II.B, above, plaintiff had no specific
 26 intent in bringing the hat **into that training meeting**, as it was just incidental that he had it with
 him at that time. However, plaintiff has explained that he brought the hat to Wy'East to express
 support for President Trump, because he agrees with its message, and because it shows others

1 that ordinary and normal people in the community support President Trump. *Id.* Indeed,
 2 common sense tells us that it was literally impossible in 2019 to wear a MAGA hat in public
 3 without it being viewed by others as an “expressive” political statement.

4 Thus, assuming the *Spence* test applies, whether plaintiff intended to convey a
 5 particularized message with his hat is a genuine issue of material fact for the jury at trial. For all
 6 of these reasons, defendants’ motion should be denied.

7 **B. Substantive Due Process under Section 1983**

8 As set forth in the First Amended Complaint, plaintiff asserts that his First Amendment
 9 retaliation claim includes two separate types of retaliatory conduct by defendants: (1) Garrett’s
 10 direct verbal attack, threats, and restrictions that were communicated to Dodge; and (2)
 11 Evergreen’s subsequent misconduct toward Dodge in how it communicated with him, how it
 12 handled the investigation on the HIB Complaint, how it failed to rectify or correct Garrett’s
 13 misconduct, how it managed his benefits, etc. With regard to the latter point, plaintiff is alleging
 14 that Evergreen’s officials (including HR Director Gomes, Superintendent Merlino, and others)
 15 were biased against Dodge and took steps to retaliate against him because he wore a MAGA hat
 16 and publicly expressed support for President Trump.

17 Alternatively, however, if these subsequent acts of retaliation by Evergreen are “found to
 18 be unrelated to plaintiff’s exercise of his constitutional right to freedom of speech under the First
 19 Amendment, then such actions and misconduct constituted violations of plaintiff’s constitutional
 20 right to substantive due process under the Fourteenth Amendment to the United States
 21 Constitution.” First Amended Complaint ¶67. “Under federal pleading standards, a plaintiff
 22 may plead claims in the alternative, even if the claims are contradictory.” *Prudential Ins. Co. of*
Am. v. Clark Consulting, Inc., 548 F. Supp. 2d 619, 623 (7th Cir. 2008); *see also* Fed. R. Civ.
 24 Pro. 8(d)(2) (allowing pleading in the alternative).

1 Substantive due process “forbids the government from depriving a person of life, liberty,
 2 or property in such a way that shocks the conscience or interferes with the rights implicit in the
 3 concept of ordered liberty.” *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009) (internal
 4 quotation omitted). An employee with a legitimate claim of entitlement to continued
 5 employment has a property interest in his job. *Wagner v. Gibson*, Case No. WDQ-12-3581,
 6 2013 U.S. Dist. LEXIS 126288 at *19-20 (D. Md. Sept. 4, 2013) (citing *Board of Regents v.*
 7 *Roth*, 408 U.S. 564, 577 (1972)). “Substantive due process is an absolute check on government
 8 actions that is warranted only when no process could cure the deficiencies in that action.” *Id.* at
 9 *20 (internal quotation omitted). Thus, in *Wagner*, the court found that the plaintiff had
 10 plausibly alleged that she was arbitrarily and irrationally deprived of a property interest under
 11 substantive due process when her boss reported his plan to Mr. Craig to terminate the plaintiff
 12 “for the purpose of bragging to Mr. Craig that he was going to terminate the wife of Mr. Craig’s
 13 political rival.” *Id.* at *21.

14 Moreover, while it is true that substantive due process claims cannot be pursued when
 15 they are wholly “duplicative” of First Amendment claims, courts have suggested that the two
 16 claims can co-exist in one action “when, for example, the alleged conduct is arbitrary and
 17 capricious but not retaliatory” or where “the alleged conduct implicates a different interest.” *See*
 18 *Addison v. City of Baker City*, 258 F. Supp. 3d 1207, 1235 n.6 (9th Cir. 2017) (collecting cases);
 19 *see also Schneider v. County of Sacramento*, No. S-12-2457, 2014 U.S. Dist. LEXIS 116809 at
 20 *19 (E.D. Cal. Aug. 21, 2014) (“Even if the claims stem from the single ‘wrong’ of the 2012
 21 FACE, a single ‘wrong[]... can implicate more than one of the Constitution’s commands.’”)
 22 (quoting *Soldal v. Cook County*, 506 U.S. 56, 70 (1992)); *see also, e.g., City of Sacramento v.*
 23 *Lewis*, 523 U.S. 833, 843 (1998) (holding that “[s]ubstantive due process analysis is therefore
 24 inappropriate in this case only if respondents’ claim is ‘covered by’ the Fourth Amendment”,
 25 finding “[i]t is not” so covered, and therefore going on to consider the merits of the due process

1 claim). Thus, if any portion of plaintiff's allegations are not "covered" by the First Amendment,
 2 then the "duplicative" concern would no longer be present.

3 Defendants mischaracterize plaintiff's substantive due process claim as only asserting
 4 that "he has a constitutionally protected right to have his HIB complaint against Ms. Garrett
 5 investigated in any particular manner." Dkt. #36 at p. 12. Rather, the claim encompasses many
 6 more allegations and facts: the fact that Evergreen's HR director (Gomes) actively encouraged
 7 and participated in Garrett's direct retaliation toward Dodge; the fact that the same person
 8 (Gomes) arrogated to herself control over the required investigation into Dodge's HIB Complaint
 9 against Garrett's despite her bias and personal interest in the proceedings; the fact that Evergreen
 10 hired a "third-party investigator" and then discarded the investigator's findings when he
 11 concluded that Evergreen had denied Dodge's "freedom of expression" and caused him
 12 substantial harm; the fact that Gomes threatened to unlawfully release Dodge's medical
 13 information to the public if he did not "rescind" his HIB Complaint; and the fact that Evergreen
 14 engaged in "gaslighting" by publicly telling Dodge there was no merit to his HIB Complaint
 15 while secretly investigating Garrett further and concluding she had been dishonest and removing
 16 her from her position as principal at Wy'East.

17 All of these events contributed to plaintiff's constructive discharge from his public
 18 employment, depriving him of his "life, liberty, and property in such a way that shocks the
 19 conscience or interferes with the rights implicit in the concept of ordered liberty." *Corales v.*
 20 *Bennett*, 567 F.3d at 568; *cf. Tinker*, 383 U.S. at 509 ("In our system, state-operated schools may
 21 not be enclaves of totalitarianism"). Defendants' conduct was arbitrary and capricious
 22 throughout this process and violated plaintiff's substantive due process.

23 Defendants' motion for summary judgment should also be denied because it is premature.
 24 First, considering that it is pled in the alternative as a "backstop" claim, the substantive due
 25

1 process claim should be allowed to proceed to trial unless and until plaintiff's entire First
 2 Amendment claim is allowed to go to the jury.

3 Second, the motion should also be denied (or alternatively deferred) under Rule 56(d) of
 4 the Federal Rules of Civil Procedure given that plaintiff is unable to present additional facts to
 5 support this opposition until after discovery has been completed, and especially the deposition of
 6 Janae Gomes and other Evergreen officials. *See* Estok Decl. ¶5.

7 **C. Tort of Outrage**

8 Defendants also challenge the sufficiency of plaintiff's pendant common-law claim for
 9 the tort of outrage under Washington law, which is also known as the tort of intentional infliction
 10 of emotional distress. As noted by defendants, plaintiff's elements on this claim include that:
 11 "(1) he or she suffered severe emotional distress; (2) the emotional distress was inflicted
 12 intentionally or recklessly, but not negligently; (3) the conduct complained of was outrageous
 13 and extreme; and (4) he or she personally was subject of the outrageous conduct." *Grange Ins.*
 14 *Ass'n v. Roberts*, 179 Wn. App. 739, 753-54, 320 P.3d 77 (2013), *rev. denied*, 180 Wn.2d 1026
 15 (2014). Summary judgment should be denied because genuine issues of material fact are present
 16 to support each of these elements, making the claim appropriate for resolution by a jury:

17 **I) Severe emotional distress**

18 The requirement of "severe" emotional distress exists to prevent a claim "in every case
 19 where someone's feelings are hurt." Restatement (2d) of Torts §46, cmt. d. The presence of
 20 "shock, illness, or other bodily harm" is "**in itself**" evidence that "the distress is genuine and
 21 severe", though that degree of harm is not required where the conduct is sufficiently outrageous.
 22 *Id.*, cmt. k. (emphasis added).

23 Plaintiff has submitted evidence of such "severe" emotional harm here. As discussed
 24 above, the verbal attacks by Garrett caused physical symptoms and manifestations to Dodge,
 25 including stuttering, loss of coordination, and an inability to function. *See* Part II.C. These

1 symptoms prevented Dodge from working as a teacher and resulted in an extended medical
 2 leave. *Id.* Moreover, the fact that the severity of his injuries may have been exacerbated by his
 3 prior stroke injuries is no argument for the defendants: under the well-established “eggshell
 4 plaintiff” rule under Washington law, “a tortfeasor takes his victim as he finds him.” *See*
 5 *Buchalski v. Universal Marine Corp.*, 393 F. Supp. 246, 248 (W.D. Wash. 1975); *Reeder v.*
 6 *Sears, Roebuck & Co.*, 41 Wn.2d 550, 556-57, 250 P.2d 518 (Wash. 1952).

7 2) *Intentional or reckless, but not negligent*

8 Plaintiff alleges that the retaliatory acts by Garrett and Evergreen were intentional: he
 9 was deliberately targeted by these biased individuals for his political views and the fact that he
 10 had worn at MAGA hat while at Wy’East. Plaintiff has offered evidence to support that such
 11 conduct was “intentional”, and plaintiff has not alleged that any of the defendants’ conduct was
 12 merely “negligent”.

13 3) *Outrageous and extreme conduct*

14 Although the Court can play a gatekeeping role on summary judgment, the question of
 15 whether certain conduct is sufficiently outrageous is ordinarily for a jury. *Dicomes v. State*, 113
 16 Wn.2d 612, 630, 782 P.2d 1002 (Wash. 1989). The conduct in question must be “so outrageous
 17 in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be
 18 regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* (quoting *Grimsby v.*
 19 *Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (Wash. 1975)); *see also* Restatement (2d) of Torts §46,
 20 cmt. d (“Generally, the case is one in which the recitation of the facts to an average member of
 21 the community would arouse his resentment against the actor, and lead him to exclaim,
 22 ‘Outrageous!’”).

23 Examples provided in the Restatement support such a finding in this case:

24 A, the president of an association of rubbish collectors, summons B to a
 25 meeting of the association, and in the presence of an intimidating group of
 associates tells B that B has been collecting rubbish in territory which the

1 association regards as exclusively allocated to one of its members. A
 2 demands that B pay over the proceeds of his rubbish collection, and tells B
 3 that if he does not do so the association will beat him up, destroy his truck,
 4 and put him out of business. B is badly frightened, and suffers severe
 5 emotional distress. A is subject to liability to B for his emotional distress,
 6 and if it results in illness, A is also subject to liability to B for his illness.

7 Restatement (2d) of Torts §46, illus. 2. Although Dodge was not threatened with physical harm,
 8 he was threatened with discipline (and by extension, the destruction of his cherished career of
 9 being a public school teacher) based on his political views and deprived of his freedom of
 10 expression which serves as the bedrock to civil society.

11 The Restatement also emphasized that the relationship between the individuals is an
 12 important consideration on this element:

13 The extreme and outrageous character of the conduct may arise from an
 14 abuse by the actor of a position, or a relation with the other, which gives
 15 him actual or apparent authority over the other, or power to affect his
 16 interests.... In particular...school authorities...have been held liable for
 17 extreme abuse of their position.

18 *Id.*, cmt. 3.

19 Thus, after receiving the evidence in this case, reasonable jurors will be led to exclaim
 20 “Outrageous”, thereby supporting this common-law tort claim. Public schools should not be
 21 totalitarian, and public employees should not have to “renounce their citizenship when they
 22 accept employment”. *Lane v. Franks*, 573 U.S. 228, 235 (2014) (adding “this Court has
 23 cautioned time and again that public employers may not condition employment on the
 24 relinquishment of constitutional rights”). Defendants’ conduct was outrageous regardless of the
 25 reasonable jurors’ own political beliefs: Garrett and Evergreen did not even keep the schools as a
 26 politically “neutral” space; rather, certain views were permitted and even promoted, while other
 27 views were not only prohibited but were retaliated against. As a result, a genuine issue of
 28 material fact exists to support this element.

29 ///

30 ///

4) Plaintiff was personally the subject of the outrageous conduct

There is no question that this element is met here. Thus, because all of the elements of the tort of outrage are supported by genuine issues of material fact, defendants' motion should be denied.

IV. CONCLUSION

Based on the foregoing, defendants' motions for summary judgment should be denied in their entirety.

Dated this 30th day of November, 2020

LINDSAY HART, LLP

By: /s/ Michael Estok
Michael Estok, WSBA No. 36471
1300 SW Fifth Avenue, Suite 3400
Portland, OR 97201
Telephone: 503-226-7677
mestok@lindsayhart.com

McKANNA BISHOP JOFFE, LLP

By: */s/ Noah Barish*
Noah Barish, WSBA No. 52077
1635 NW Johnson Street
Portland, OR 97209
Telephone: 503-821-0960
nbarish@mbjlaw.com

Attorneys for Plaintiff Eric Dodge